2006

State of Utah v. Matthew Bowman : Brief of Appellant

Utah Court of Appeals

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20060087-CA

UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

MATTHEW BOWMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

Appeal from the Final Order and Judgment of the
Seventh Judicial District Court, Carbon County
State of Utah, by the Honorable Scott N. Johansson

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ORAL ARGUMENTS AND PUBLISHED OPINION NEEDED

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[None].

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, vs. MATTHEW BOWMAN, Defendant and Appellant.	)	**BRIEF OF APPELLANT** Case No. 20060087-CA

PRELIMINARY STATEMENT.

This is a post-conviction appeal. The trial court committed the Defendant to prison on a supposed probation violation. The Defendant's contention is he was entitled to both the right of representation of counsel and to assistance of counsel. The trial court denied him to counsel despite the repeated assertion that he had hired counsel. The counsel representation was supported by the record and admitted by the prosecutor. Due to no fault of Defendant, the trial court forced the Defendant to represent himself and then upon the errs of the court found a violation had allegedly occurred upon so-called beyond reasonable doubt and subsequently committed the Defendant to the Utah State Prison.

STATEMENT OF JURISDICTION.

Jurisdiction is conferred on this Court by *Utah Code Ann.* § 78-2a-3 (1953, as amended) (2)(e) (appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony). Mr. Bowman appeals the final order and judgment of the Seventh Judicial District Court, in and for Carbon County for a supposed probation violation.

STATEMENT OF ISSUES.

(1) Whether Defendant was deprived his Sixth Amendment right to counsel?

(2) Whether the trial court lost jurisdiction 'in the course of the proceedings' due to the judge's failure to complete the court – as the Sixth Amendment requires – by providing counsel for an accused who was unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty was at stake?

(3) Whether Defendant knowingly and intelligently waived the assistance of counsel in this matter?

(4) Whether the trial court indulged every reasonable presumption against Defendant waiving his Sixth Amendment right to counsel and whether the court ignored the presumption against the relinquishment or abandonment of a known right or privilege?

(5) Whether Defendant was deprived a full and fair hearing?

STANDARD OF REVIEW.

The standards of review in this matter has long since been established and was reiterated by this Court:

"'Constitutional issues . . . are questions of law which we [also] review for correctness.'" *In re B.V.*, 33 P.3d 1083 (Utah Ct. App. 2002). (citations omitted).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.

U.S. Const., 6th Amend.

U.S. Const., Fourteenth Amend.

Utah Rules of Civil Procedure 5

Utah Rules of Civil Procedure 81(e)

STATEMENTS OF THE CASE.

I. Nature of the Case:

This case arises from an illegally conducted hearing. The court's jurisdiction at the hearing was lost 'in the course of the proceedings' due to failure to complete the court – as the Sixth Amendment requires – by providing counsel for an accused who was clearly unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty was at stake.

II. Course of the Proceedings:

This matter commenced on January 30, 2004 by the filing of two criminal Informations. Those two Informations created separate cases, case no. 041700044 and 041700046. R. 1, R. 1. Bruce Oliver, attorney at law was contacted and hired. Mr. Oliver appeared and represented Mr.

Bowman in this matter on several occasions, including two post-conviction probation violation charges, despite not receiving notice from either the State or the trial court. Subsequently, the State moved again for Mr. Bowman's probation to be revoke on alleged probation violation charges, without notice to Bruce Oliver again. Four hearings were held between December 9, 2005 and December 20, 2005 without Mr. Bowman's counsel being present. At the conclusion, Mr. Bowman was found in violation and committed to the Utah State Prison.

III. Disposition in Trial Court:

On December 20, 2005, the trial court forced Mr. Bowman to represent himself at a order to show cause. After the State rested, the court was prejudiced by information from the prosecutor claiming that another violation was being screened for filing and depending on the outcome of this proceeding will determine whether the next one is filed. After hearing that, the court committed the defendant to prison.

IV. Statements of Fact:

This matter commenced on January 30, 2004 by the filing of two criminal Informations. Those two Informations created separate cases, case no. 041700044 and 041700046. R. 1, R. 1. Bruce Oliver, attorney at law was contacted and hired. The next entries on February 18, 2004, in both cases was Mr. Oliver's motion to recall warrants. R. 2, R. 2. Both motions were denied on February 19, 2004, because the judge determined Mr. Bowman was a flight risk. R. 4, R. 4. Subsequently, while remaining incarcerated, Mr. Bowman pled guilty to two second degree felony charges on August 2, 2004. R. 13-22. On August 5, 2004, final judgment was entered.

The Judgment reflected that defendant counsel of record was "D. Bruce Oliver" even though David M. Allred was a stand-in for Bruce Oliver during the August 2, 2004 change of plea. R. 23-25, R. 23-25.

Subsequent to conviction, while Mr. Bowman was on probation, the State filed a Motion for Order to Show Cause on October 13, 2004. R. 27, R. 27. The motion was accompanied by an affidavit alleging "By having committed or by having been convicted of the offense of Fraud on or about September 10, 2004, in violation of condition number three of the Probation Agreement." R. 28-29, R. 28-29. A copy of the motion and affidavit was not provided to the defendant's counsel. Upon the filing of the affidavit and motion, the trial court, Judge bruce K. Halliday issued two orders to show cause. R. 32-33, R. 32-33. The hearing on the Orders to Show Cause was set for November 22, 2004. R. 32, R. 32. A copy of the orders to show cause were not provided to counsel of record. In stead they were personally served upon the Defendant himself on November 18, 2004 - - less than 4 calendar days before the scheduled hearing. R. 33, R. 33.

On November 22, 2004, the trial court provided the defendant two notices, entitled Notice of Order to Show Cause and Order. R. 34, R. 34. Both notices set the date for hearing on January 4, 2005 and Mr. Oliver appeared and represented Mr. Bowman. R. 38, R. 38. Ultimately on May 23, 2005, the trial court restarted the defendant's 36 month probation. R. 46 (041700044), R. 47 (041700046). The order on order to show cause states, "defendant having appeared before the Court on May 23, 2005, together with his attorney, D. Bruce Oliver . . . ." *Id.*

Then again, the State moved for an order to show cause on November 21, 2005 in both

matter claiming a probation violation in the accompanying affidavit. R. 49-53 (041700044), R. 50-51 (041700046). None of these documents were provided to counsel of record. *Id.* On December 8, 2005, warrant were issued by the Court and returned executed on December 16, 2005. R. 57, R. 58.

The next day, Mr. Bowman was brought before the Court. On December 9, 2005, the Honorable Bryce K. Bryner, the judge advised Mr. Bowman he had the right to counsel stating, "Now, you're entitled to be represented by an attorney at all stages of these proceedings. If you cannot afford an attorney, then I'll appoint one for you." Mr. Bowman informed Judge Bryner he was attempting to contact his attorney so the matter was reset to resume on December 12, 2004 at 1:00 p.m. T. 2-3.

On December 12, 2005, before the Honorable Bruce K. Halliday, again advised Mr. Bowman of his right to counsel, stating, "Because you may be sent to prison if I find you have broken the terms of your probation, you're entitled to have Counsel appointed if you can't afford Counsel; and all of the matters before this Court, you have the right, of course, to have an attorney present. I believe you were - - were you represented in the underlying matter by . . . Bruce Oliver, was it? Do you intend to try to hire him again or . . . ." T. 2-3. Mr. Bowman informed Judge Halliday, "I did get a hold of him this morning the moment my phone card and everything came in. So he will . . . ." The Judge clarified as to whether Bruce would represent Mr. Bowman and Mr. Bowman responded affirmatively, "Yes, sir." "- - in these two matter?, asked the court. "Yes, sir" replied Mr. Bowman. T. 3. Following, as Judge Halliday attempted to schedule the matter further, he addressed the issue of appearance, stating, "I think we'd better kind of short circuit this and just record it. Judge Bryner can't take it, and so he'll pass it to

Judge Johansson, and ask him to have the defendant before him on a date certain; and to give notice to Mr. Oliver that that's the case for arraignment and/or bail setting, and indicate that he's - - remains incarcerated going towards the Christmas holiday." T. 6. Despite the conversation and the expressed desire that Judge Johansson provide notice, no notice ever was provided to Counsel, D. Bruce Oliver. Mr. Bowman was remanded by to the custody of the sheriff. *Id.*

On December 14, 2005, before the Honorable Scott N. Johansson, the county prosecutor, Gene Strate appeared and Mr. Bowman was present without counsel. The trial court advised Mr. Bowman he was before the court on two orders to show cause and Mr. Bowman denied having been provided copies. Unlike the first motion for order to show cause, the court failed to issue an order to show cause and Mr. Bowman was only brought before the court on a warrant. R. 57, R 58; T. 3. During the hearing, Mr. Strate informed the court, "There was a warrant of arrest for him, your Honor, on warrants." T. 3. Then Mr. Strate apprized the court, "I think Judge Bryner likely read the allegations to him, you Honor. If there's a blanket denial, I'd be glad to mail copies of these to Mr. Oliver." That statement was confirmed by Mr. Bowman. T. 4.

Being apprized, the Court took Mr. Bowman's response. For each of the four allegations against Mr. Bowman, Mr. Bowman denied them all. T. 4-5. The denials were taken without representation or assistance of counsel. And despite the general denial, contrary to Mr. Strate's statement, he did not provide counsel, D. Bruce Oliver a copy.

Having accepted the general denial, the trial court set the matter further for proceedings on December 20, 2005. The exchange between the court and Mr. Bowman was:

> THE COURT: Sounds like a good idea to me. Tuesday, December 20th. That's a week from yesterday. Is that all right, Mr. Bowman?

MR. BOWMAN: As far as I know, sir, it's going to have to be good, until I can contact my lawyer and see if he's got the day open or not, but that's - -

THE COURT: Have you talked to him?

MR. BOWMAN: I've definitely notified him, and - - on today's matter, and he hasn't made it here. So I'm not sure what's going on. I will contact him as soon as I get done with the video Court.

T. 5.

On December 20, 2005, before the court, Mr. Bowman appeared and so did Gene Strate. No notice of the hearing is part of the record. Mr. Strate did prepare a subpoena though for his witness, Jeff Wood, the probation officer of Mr. Bowman. R. 59. The record reflects that the subpoena was served on December 16, 2005. R. 59. Judge Johansson addresses with Mr. Bowman the issue about counsel. Mr. Bowman informed the judge that Bruce Oliver is his attorney and he was supposed to be present. Upon Mr. Bowman's statements to the court, Mr. Strate interjected:

And your Honor, if I could interject. Mrs. Bowman called me just as Court was starting today. Said that Mr. Oliver couldn't be here today. I haven't been crystal clear whether Mr. Oliver was really coming in the case. He tried to call me just before the last time we were here, and I didn't get a chance to call him back. We faxed him reports in these matters. At least the order to show cause pleadings.

T. 3.

The court asked Mr. Strate how long ago the documents[1] were provided, and Mr. Strate responded:

Let's see. We were last here on the 14th, and we faxed him the same day, it looks like. I

[1] As the record reflects "the documents" are the motion and affidavit. There was never a notice of hearing prepared and filed nor an order issued providing date, time and place information.

assumed that Mr. Bowman would tell Mr. Oliver that he needed to be here today. I understand Mr. Oliver - - from what Mrs. Bowman told me, Mr. Oliver's apparently at some other Court proceeding, but I haven't seek a motion to continue. I haven't received an appearance of Counsel, so I'm not - - wasn't sure whether he was actually in the case.

T. 3. Mr. Bowman added, "He is. He's been retained." The court then rejected Mr. Bowman's claim, stating:

> All right, let's see. I've reviewed both files. There is no appearance of Counsel. There's nothing to indicate that Mr. Oliver's in this case at all. So the Court is going to find that you were advised of your right to Counsel on the - - when was it, the 12th of December?

T. 4. Mr. Strate fueled the court claiming:

> Well, Mr. Bowman's actually made three appearances on the order to show cause. He first appeared on December 9th. It was rolled over to the 12th for him to have Counsel, and that's when your Honor set the hearing today.

T. 4. The first two hearings had been set before two different judge, one Judge Bryner, the other Judge Halliday. The Court then violated Mr. Bowman's right to counsel determining that Mr. Bowman had waived his right to counsel, to assistance of counsel, and to appointed counsel stating:

> THE COURT: Okay. So you have waived your right to Counsel by failing to retain Counsel, and we're going to go ahead today.

T. 4. The State called its witness, Jeff Wood and without counsel, the court took evidence. T. 4-11. After the State rested, the court asked Mr. Bowman if he had any questions for the witness. T. 10. The court did not inform Mr. Bowman that it was his right to cross examine. Mr. Bowman declined. T. 10. The court then asked Mr. Bowman if he had any evidence to present. Mr. Bowman informed the court, "I didn't have a chance to contact anybody to be here with any evidence, because I thought my lawyer was going to be here." "So that's a 'no?'" the Court asked. The defendant was asked then if he wanted to testify. When Mr. Bowman asked who

would question him, the court said nothing so Mr. Bowman again declined. The exchange was:

> THE COURT: Well if you're going to testify, I've got to put you under oath and put you up here. If you're not, you know I - -
>
> MR. BOWMAN: If I was going to testify, wouldn't somebody have to question me, or - -
>
> THE COURT: Yeah.
>
> MR. BOWMAN: Well, I guess I don't have anything.

T. 11. The court simply asked Mr. Strate if he was going to "submit it?" Upon submission, the prosecutor illegally informed the court that other issues not yet before the court were being considered for prosecution. Mr. Strate stated, "Obviously you Honor can't adjudicate that today, but it's claiming another possession or use of methamphetamine on November 30th." T. 12. The court asked if they were new charges and Mr. Strate acknowledged that they were. T. 12.

> MR. STRATE: Yes, a new motion for order to show cause. He probably has not been served with that, and I actually have not signed the original motions, because I knew this hearing was going to come up and I was going to discuss it with Mr. Oliver, but just to let the Court know that we may me - - I guess depending on the outcome of today's hearing, may be filing that on him also.

T. 12. With this prejudicial remark considered, the court made its findings.

> THE COURT: The Court finds, based on the evidence, that the allegations of the order to show cause,[2] paragraph 1 through 5 in the affidavit, have been proved. That - - standard is by a preponderance, right? Probable cause?[3]
>
> * * * * *
>
> The Court finds that even by a higher standard of beyond reasonable doubt, the allegations have been proven, and that the defendant has violated his terms of probation.

T. 12-13.

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[2] Reminder: No record of an order to show cause exists, there never was one issued by the court. The court acted on the motions only and no hearing notice was provided to counsel, providing date, time, and place.

[3] Even Mr. Strate did not know what the standard of proof is. T. 12.

The Mr. Strate recommended probation be revoked and that Mr. Bowman be committed to prison. T. 13. When the court asked Mr. Bowman about sentencing, Mr. Bowman responded:

> I really don't know what to do, because I know I've retained Mr. Oliver, and I know he's been trying to get a hold of Mr. Strate. So I really don't know what to do, or what to say, to be real honest with you, your Honor.

T. 13. In reply, the court told Mr. Bowman:

> Well, let me - - let me tell you where you're at, then. Then if you've got anything to say. You've been on notice since at least the 9th of December that this hearing was coming up and that you had the right to Counsel. You informed the Court at that time you intended to hire Mr. Oliver.
>
> I don't know whether you've given him any money or whether you've just made a phone call or not contacted him at all. I don't know, but there are two ways for him to get into the case. One is to file what we call a "notice of appearance" which he has not done. The other one is to show up, which he has likewise not done.
>
> So the allegations in the order to show cause have been proven. Now, the only question left, is what should the Court do about it. The recommendation from Adult Probation and Parole is to give you some jail time and then start you over. I will tell you that I'm at a loss to see why I should, but I'll listen to that.

T. 13-14. Mr. Bowman explained that there was a break-down of communications between his treatment and Mr. Bowman's probation officer, Jeff Wood. In other words, explaining that he was not a fault. T. 14. The court rejected the explanation and committed Mr. Bowman to prison.

SUMMARY OF THE ARGUMENTS

Issue One: Sixth Amendment Violation.

In this matter, the record is clear that Defendant's court was not complete. The Supreme Court revealed in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938), a court's jurisdiction at the hearing of trial may be lost "in the course of the proceedings" due to failure to complete the court–as the Sixth Amendment requires–by providing

counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. The judge forced the Defendant to be tried without counsel. Its undisputed that Mr. Bowman repeated informed the court that his attorney was Bruce Oliver. Moreover, it is undisputed that the record reflected that Bruce Oliver was counsel of record and yet no one, not the court nor the State ensured that Mr. Oliver was provided notice of proceedings and of filings contrary to Rule 5 of the Rules of Civil Procedure and Rule 81(e) of the Rules of Criminal Procedures.

Issue Two: Fourteenth Amendment Violation.

In this matter, a manifest error resulted and the Defendant was deprived of a fair trial. Due Process requires procedural fairness, including notice of proceedings, which informs him in writing of time, date, and type of hearing being held. In this matter, no written notice was provided to Defendant or Counsel and thus Counsel was not aware of proceedings, or of filings in the case, despite being counsel of record. The State and the court violated Rules 5 and 81(e) of the Utah of Civil Procedure in that notice and delivery of pleadings, documents, and motions filed in the case are required to be provided to counsel of record. Even though the judge in this matter claimed Mr. Oliver had not entered any appearance of Counsel, the record is certain that Counsel had rountinely appeared and represented Mr. Bowman, including during post-conviction proceedings. What the court should have and failed to consider is that Mr. Oliver had not withdrawn his appearance.

ARGUMENTS

POINT I.

UNDER JOHNSON v. ZERBST, GIDEON v. WAINRIGHT, AND PENSON v. OHIO THE CONVICTION IN THIS MATTER IS VOID FOR HAVING AN INCOMPLETE COURT PURSUANT TO THE SIXTH AMENDMENT.

In this matter, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938) and *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) are controlling. In this matter, the record reflects that Mr. Bowman was incarcerated. The record is also clear that on December 9, 2005, Judge Bryner and then Judge Halliday on December 12, 2005, they both advised Mr. Bowman that he had the right to have Counsel appear and represent him where his liberty was in jeopardy. (12-9-2005 transcript, pp. 2-3; 12-12-2005 transcript, pp. 3-4) The record also accurately reflects that the court was made aware that Mr. Oliver was hired to represent Mr. Bowman and that Mr. Bowman desired representation of Counsel, Mr. Oliver. The record also reflects that Mr. Oliver was Mr. Bowman's Counsel during the underlying proceedings and in post-conviction proceedings in 2004 and early 2005. R. 2, 34, 38, 47.

In the Sixth Amendment context, Mr. Bowman has been prejudiced in this matter. In *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Supreme Court established in right to Counsel in state criminal proceedings is guaranteed by the Sixth Amendment. It is therefore impermissible to try a person for a felony in a state court unless that person has Counsel or knowingly and intentionally waives the right to Counsel. In this matter, the defendant informed the court that he retained Counsel, on several occasions. The State also

was aware of Counsel's representation and informed the court that Mr. Oliver had attempted contact with the prosecutor. During two hearings, December 12, 2005 and December 14, 2005, the prosecutor informed the court that he would be contacting Mr. Oliver. (12-12-2005 transcript, p. 6; 12-14-2005 transcript, p. 4) However, no such contact included notice of the proceedings, which is to include, date, time and type of proceeding.

Furthermore, Mr. Bowman disputed waiving the right to counsel. (12-20-2005, pp, 3, 13) To raise the issue and produce some evidence that he or she was not represented by Counsel and did not knowingly waive counsel at an earlier proceeding which resulted in a conviction, Utah recognizes that it is appropriate to presume that the right to counsel has been observed "unless the defendant affirmatively contends to the contrary." *State v. Triptow*, 770 P.2d 146, 147-48 (Utah 1989) (citing *Burgett v. Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois,* 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980) (per curiam)). This concept and these principles were recently challenged and upheld in *State v. Pedockie*, 2006 UT 28, ¶33 (Utah Supreme Court, May 12, 2006). No affirmative expression exists as part of this record.

In *Pedockie*, the State argued that an implied waiver exists. Like a true waiver, even an implied waiver needs to be voluntary and must also be "knowing and intelligent." *Pedockie*, 2006 UT 28, ¶ 33 (citing *Goldberg*, 67 F.3d at 1102). In other words, in addition to knowing the consequences of continued misconduct, the defendant must "possess[] an awareness of the dangers and disadvantages of self-representation at the time of the implied waiver." *Id.* "'[T]he trial court must ensure that the defendant is cognizant of the dangers and disadvantages of self-representation' and that his waiver is therefore knowing and intelligent." *Id.* at ¶ 38. A review of

Pedockie, Attachment "B," demonstrates it is clearly supporting of Mr. Bowman's contentions. On certiorari, the Utah Supreme Court held that Pedockie voluntarily waived his right to counsel through his dilatory conduct. It nevertheless, reversed his conviction, holding that the waiver was not knowing and intelligent. The Supreme Court then affirmed the reversal of the conviction, but on different grounds.

The Court stated, "Like the court of appeals, we recognize that an accused may voluntarily waive his right to counsel through his conduct. But we find no such voluntary waiver in this case." *Id.* In this matter, the trial court found a waiver. However, no such waiver occurred and needless to say, if such a waiver is found by this Court it should not find that a waiver was either knowingly or voluntary. During the proceedings, Mr. Bowman asserted and reasserted that he hired Bruce Oliver. (12-9-2005 transcript, pp. 2-3; 12-12-2005 transcript, pp. 2-3; 12-14-2005 transcript, p. 4; 12-20-2005 transcript, pp. 3, 13) The record reflected that Mr. Oliver represented Mr. Bowman since the very initiation of the cases' underlying proceeding on the State's Information. R. 1, 2; R. 1, 2. Mr. Oliver's filed documents are throughout both files, including the very next document following the filed Informations. R. 2, R. 2. The second document in both files is Mr. Oliver's motion to recall warrants. R. 2, R. 2. Also, it is clear that Mr. Oliver represented Mr. Bowman in post-conviction proceedings in 2004 and early 2005 as reflected in the May 26, 2005 order. R. 46, R. 47. The fact of continued intent to represent was confirmed and corroborated by Gene Strate, the prosecutor, who told the court that Mr. Bowman's mother confirmed the representation just before court that morning. (12-20-2005 transcript, p. 3) He told the court that he assumed the Defendant would notify Mr. Oliver in contradiction to he former advisory that he would provide notice to Mr. Oliver.

How the court could find a waiver in this matter is offensive to the Constitution? How the court could believe a waiver was voluntary is equally disturbing? This Court should, if for nothing else, remand this matter with instructions to the trial court to take evidence as to voluntariness. However, there is enough information present in the record and the record is adequate to conclude that (1) Mr. Bowman's right to Counsel had been violated and (2) the trial court failed it's duty to protect Mr. Bowman's Sixth Amendment right, and hence this matter should be reversed with strong admonish to protect the rights henceforth. A de novo review of the Sixth Amendment constitutional question leaves little doubt that the trial court did not indulge every opportunity against allowing a waiver to happen. The defendant demands a new hearing which should be conducted because the first was void absent counsel.

In *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938) the Supreme Court stated:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' *Cf.* Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288. It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer - - to the untrained layman- - may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '. . . the humane policy of the modern criminal law . . . .' which now provides that a defendant ' . . . if he be poor, . . . may have counsel furnished him by the state, . . . not infrequently . . . more able than the attorney for the state.' Patton v. United States, 281 U.S. 276, 308, 50 S. Ct. 253, 261, 74 L. Ed. 854, 70 A.L.R. 263.

The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with th rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him.' Powell v. Alabama, 287 U.S. 45, 68, 69, 53 S. Ct. 55, 63, 64, 77 L. Ed 158, 84 A.L.R. 527. The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

Two. There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right of counsel must depend , in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed 854, 70 A.L.R. 263, decided that an accused may, under certain circumstances, consent to a jury of eleven and waive the right to trial and verdict by a constitutional jury of twelve men. The question of waiver was there considered on direct appeal from the conviction and not by collateral attack on habeas corpus. However , that decision may be helpful in indicating how, and in that manner, an accused may–before his trial results in final judgment and conviction– waive the right to assistance of counsel. The Patton Case noted approvingly a state court decision pointing out that the humane policy of modern criminal law had altered conditions which had existed in the 'days when the accused could not testify in his own behalf, (and) was not furnished counsel' and which had made it possible to convict a man when he was 'without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story . . . . '

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused– whose life and liberty is at stake–is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. Three. The District Court, holding petitioner could not obtain relief by habeas corpus, said: 'It is unfortunate, if petitioners lost there

> right to a new trial through their ignorance or negligence, but such misfortune cannot give this court jurisdiction in a habeas corpus case to review and correct the errors complained of.'
>
> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitutional. True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities–not involving the question of jurisdiction–occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' Woolsey v. Best, 299 U.S. 1, 2, 57 S. Ct. 2, 81 L. Ed 3. These principles, however, must be construed and applied so as to preserve–not destroy–constitutional safeguards of human life and liberty.
>
> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived , the assistance of counsel is not longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdiction bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the hearing of trial may be lost 'in the course of the proceedings' due to failure to complete the court–as the Sixth Amendment requires–by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. Frank v. Mangum, 237 U.S. 309, 327, 35 S. Ct. 582, 587, 59 L. Ed. 969. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. Ex Parte Hans Neilsen, Petitioner, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118. A judge of the United States–to whom a petition for habeas corpus is addressed–should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.' *Cf.* Moore v. Dempsey, 261 U.S. 86, 92, 43 S. Ct. 265, 267, 67 L. Ed. 543; Patton v. United States, 281 U.S. 276, 312, 313, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263.

Id., at 462-468.

The *Johnson* Court remanded the matter back to the district court to address the question of a waiver. In this case, the record is clear that there was no waiver. The record is clear that Mr.

Bowman asserted and reasserted he had Counsel. (12-9-2005 transcript, pp. 2-3; 12-12-2005 transcript, pp. 2-3; 12-14-2005 transcript, p. 4; 12-20-2005 transcript, pp. 3, 13)

Nevertheless, in light of *Johnson*, at 467-468, what is clear is that the Court was not complete on December 9, 12, 14 and 20, 2005. The U.S. Supreme Court requires counsel to be present or the court is not complete. *Johnson*, supra. After informing Mr. Bowman he had right to counsel the court deprived him of counsel representation, chipping away and away Mr. Bowman's right to a meaningful hearing. First, reading the allegations against him without counsel, but not providing him with a copy either for counsel. (12-9-2005 transcript, p. 2) Second, taking by his plea without counsel. (12-14-2005 transcript, p. 4) Third, by conducting a trial without counsel. (12-20-2005 transcript). And finally, by sentencing the defendant to prison without counsel. (12-20-2005 transcript). All of this occurred without Counsel, contrary to the clear record that counsel, Bruce Oliver, had not withdrawn from either case and also clear in the record that Counsel was not provided any notice of the proceedings. Neither the court nor the State provided counsel notice of date, time and nature of the hearing. In this matter, the court and the State routinely violated Rules 5 and 81(e) of the Rules of Civil Procedure, by not providing Mr. Oliver copies of documents being filed with the Court.

The principles of above were reiterated by the Supreme Court of the United States in *Penson v. Ohio*, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) stated "[A] pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error. Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, . . . the presumption of prejudice must extend as well to the denial of counsel on appeal."

In this matter, even post-conviction proceeding are entitled right of Counsel and Mr. Bowman was advised of that right by Judge Halliday. (12-12-2005 transcript, p. 2) However, Mr. Bowman was denied that right by Judge Johansson, contrary to the lip service he did receive. (12-14-2005 transcript; 12-20-2005 transcript) It appears that this above described circumstance does not raise to the level of a waiver in no way. The waiver must have been knowing and deliberate besides. Even the trial court recognized the right when Mr. Bowman was informed he had that right. But the court and the State did everything to ensure that right was not protected. In *Johnson*, the Supreme Court said, "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court. . . ." *Id.*, at 462-463. As case law mandates, prejudice such as in this matter is presumed. This Court should determine that a manifest error has resulted and that the trial court erred by not protecting Mr. Bowman. As directed by the Supreme Court of the United States, the defendants in state felony proceedings are guaranteed counsel at all critical stages, including trial and sentencing. Nothing in this record shows that this guarantee here was honored.

POINT II.

DUE PROCESS WAS VIOLATED BECAUSE NEITHER MR. BOWMAN AND COUNSEL RECEIVED ADEQUATE NOTICE.

In this matter, the defendant raises an issue of due process, the most basic of fundamental priniciples, dating back to the common law – notice. The constitutional right to fair notice of a criminal charge is the right of a defendant to be "apprised of the particulars of the charge [so as] to be able to 'adequately prepare his defense.'" *State v. Fulton*, 742 P.2d 1208, 1214 (Utah 1987) (quoting *State v. Burnett*, 712 P.2d 260, 262 (Utah 1985), cert. denied, 484 U.S. 1044 (1988)). See also *State v. Robbins*, 709 P.2d 771 (Utah 1985). Utah's due process clause provides, "No person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7. In *Untermeyer v. State Tax Commission*, the Supreme Court held that Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution. 102 Utah 214, 129 P.2d 881, 885 (Utah 1942). The Utah Courts have delineated these requirements in a variety of contexts, for "'due process is flexible and calls for the procedural protections that the given situation demands.'" *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 911 (Utah 1993) (quoting *In re Whitesel*, 111 Wash. 2d 621, 763 P.2d 199, 203 (Wash. 1988)). At a minimum, "timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness." *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983); accord *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990); see also *Provo River Water Users' Ass'n v. Morgan*, 857 P.2d 927, 934 (Utah 1993). The Courts have also held that "every person who brings a claim in a court or at a hearing held before an administrative agency has a due process

right to receive a fair trial in front of a fair tribunal." *Id.* Proceeding in this matter, in the manner that it had, is no demonstration of procedural fairness. Neither the court, nor the State provided Mr. Bowman's counsel notice of the proceedings, no certifications of mailing demonstrate that either Rules 5 or 81(e) of the Utah Rules of Civil Procedure were followed. If procedural due process is ensured by proper notice to counsel and counsel's attendance and meaningful participation, then clearly due process was violated in this matter.

This Court should make it unequivocally clear that Rule 5 and 81(e) of the Utah Rules of Civil Procedure apply in criminal proceedings. The Court's record must reflect that notice and opportunity for a meaning hearing are provided by ensuring that notice and certifications of delivery, mailing, and or service are provided because "Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties." Utah R.Civ.P. 5(a)(1). And when that party is represented by Counsel, service is accomplished by service upon that attorney, because "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court." Utah R.Civ.P. 5(b)(1).

In this matter, never once does the record reflect that notice of the proceedings conducted

on December 9, 12, 14, and 20, 2006 were provided in writing, nor does the record reflect that notice went to Counsel, despite the obvious representation being made known to the court. The State never had the court issue an order to show cause on its motion. The motion and supporting affidavit do not have a certificate of service to either the counsel or party.

Clearly, Mr. Bowman was denied due process. The right to be heard in a meaningful way is lost unless by counsel. *Johnson*, U.S. at 462-463.

CONCLUSION

Based upon the foregoing, Mr. Bowman requests this Court to vacate the Defendant's commitment for loss of jurisdiction in the course of the proceedings for not providing a complete court – as the Sixth Amendment provides the trial court cannot deprive the accused of counsel at all critical stages. Also, due to multiple violations of due process for lack of notice of the proceedings, and due to the failure to service copies upon the party his counsel, all of the pleadings, motions and documents filed with the court should be stricken because Mr. Bowman is entitled to fundamental fairness, which includes adequate notice in order to prepare a defense.

RESPECTFULLY SUBMITTED this 31st day of August, 2006.

D. BRUCE OLIVER, L.L.C.

D. BRUCE OLIVER
Attorney for Appellant and Defendant

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 31st day of August, 2006, I served a copy of the foregoing **BRIEF OF APPELLANT** upon the counsel for the Appellee in this matter, by mailing it to the State of Utah by first class mail with sufficient postage prepaid to the following address: Laura B. Dupaix, J. Frederic Voros, Jr., Mark L. Shurtleff, Office of the Attorney General, P.O. Box 140854, Salt Lake City, Utah 84114-0854.

D. BRUCE OLIVER

ATTACHMENTS

GENE STRATE #3137
Carbon County Attorney
120 East Main Street
Price, Utah 84501
(435) 636-3240

IN THE SEVENTH JUDICIAL **DISTRICT** COURT OF CARBON COUNTY
STATE OF UTAH

THE STATE OF UTAH,	)	
	)	**JUDGMENT AND COMMITMENT**
	)	**TO STATE PRISON**
Plaintiff,	)	036-1-04 & 039-1-04
vs.	)	
	)	
MATTHEW BOWMAN	)	Criminal No. 041700044
	)	Criminal No. 041700046
DOB: 9/13/82	)	Judge SCOTT N. JOHANSEN
Defendant.	)	

These cases having come before the Court for Order to Show Hearings on December 20, 2005, pursuant to Motions for Order to Show Cause initiated by the State of Utah and Utah State Corrections, and the defendant having been present in Court when evidence was presented by the State in support of the allegations in the Affidavits in Support of the Motions, and the Court having found that the defendant is in violation of the terms of his probation in each of these cases;

IT IS HEREBY ORDERED that the defendant's probation in each of these cases is revoked and the defendant is committed to the Utah State Prison for two concurrent terms of one (1) to fifteen (15) years as set forth in the original Judgement for the charges in case no. 041700044 for DISTRIBUTING OR ARRANGING THE DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Second Degree Felony and in case no. 041700046 for DISTRIBUTING OR ARRANGING THE DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Second Degree Felony. The defendant shall further be responsible for any fines or restitution remaining in these matters.

ATT. "A"

59

You, the said MATTHEW BOWMAN, are hereby rendered into the custody of the Sheriff of Carbon County, State of Utah, to be by him delivered into the custody of the Warden, or other proper officer of said State Prison.

DATED this 28th day of December, 2005.

BY THE COURT:

SCOTT N. JOHANSEN, Judge

STATE OF UTAH
SEVENTH JUDICIAL DISTRICT

Leo

GENE STRATE #3137
Carbon County Attorney
120 East Main Street
Price, Utah 84501
(435) 636-3240

IN THE SEVENTH JUDICIAL **DISTRICT** COURT OF CARBON COUNTY
STATE OF UTAH

THE STATE OF UTAH,	)	
	)	**JUDGMENT AND COMMITMENT**
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Plaintiff,	)	036-1-04 & 039-1-04
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DATED this 28th day of December, 2005.

BY THE COURT:

SCOTT N. JOHANSEN, Judge

STATE OF UTAH SEVENTH JUDICIAL DISTRICT

137 P.3d 716, 2006 UT 28, 551 Utah Adv. Rep. 23

Supreme Court of Utah.
STATE of Utah, Plaintiff and Petitioner,
v.
Robert Brian PEDOCKIE, Defendant and Respondent.
No. 20040746.
May 12, 2006.

Background: Defendant was convicted in the Second District Court, Ogden Department, Ernest W. Jones, J., of aggravated kidnapping. Defendant appealed. The Court of Appeals, 95 P.3d 1182, reversed and remanded.

Holdings: On grant of State's petition for writ of certiorari, the Supreme Court, Parrish, J., held that:
(1) in the absence of a colloquy on the record between the court and the defendant determining the validity of a waiver of counsel, reviewing court should review the record de novo to determine validity of the waiver regardless of whether extraordinary circumstances exist, and any doubt must be resolved in favor of the defendant; abrogating *State v. Heaton*, 958 P.2d 911;
(2) as an issue of first impression, record did not establish that defendant voluntarily waive his right to counsel through his own conduct; and
(3) even if defendant had voluntarily waived his right to counsel through his own conduct, record did not establish that such waiver was knowing and intelligent.

Affirmed.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(S) Decisions of Intermediate Courts
110k1179 k. In General. Most Cited Cases

On certiorari, Supreme Court reviews the decision of the court of appeals, not the decision of the trial court.

[2] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k735 k. Mixed Questions of Law and Fact. Most Cited Cases

Whether a defendant voluntarily, knowingly, and intelligently waived his right to counsel is a mixed question of law and fact. U.S.C.A. Const.Amend. 6.

[3] KeyCite Notes

110 Criminal Law
110XXIV Review

ATT. "B"

110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases

110 Criminal Law KeyCite Notes
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(1) k. In General. Most Cited Cases

While Supreme Court reviews questions of law for correctness, a trial court's factual findings may be reversed on appeal only if they are clearly erroneous.

[4] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.7 Affirmative Duties in Protection of Right
110k641.7(1) k. In General; Advice, Preliminary Inquiry and Appointment by Court. Most Cited Cases

Before permitting a defendant to waive his right to counsel and proceed pro se, a trial court should ensure that the waiver is voluntary, knowing, and intelligent. U.S.C.A. Const.Amend. 6.

[5] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.4 Waiver of Right to Counsel
110k641.4(2) k. Capacity and Requisites in General. Most Cited Cases

A defendant seeking to waive his right to counsel and proceed pro se should be made aware of the dangers and disadvantages of self-representation, as the waiver will only be valid if the defendant is aware of the dangers and disadvantages of self-representation. U.S.C.A. Const.Amend. 6.

[6] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.7 Affirmative Duties in Protection of Right
110k641.7(1) k. In General; Advice, Preliminary Inquiry and Appointment by Court. Most Cited Cases

The most reliable way for a trial court to determine whether a defendant seeking to proceed pro se is

aware of the dangers and disadvantages of self-representation is to engage in a colloquy on the record. U.S.C.A. Const.Amend. 6.

[7] KeyCite Notes 

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(2) k. Nature and Elements of Waiver. Most Cited Cases

"Waiver" is an intentional relinquishment of a known right.

[8] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.4 Waiver of Right to Counsel
110k641.4(1) k. In General; Right to Appear Pro Se. Most Cited Cases

Unlike waiver, a defendant's forfeiture of right to counsel results in the loss of the right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. U.S.C.A. Const.Amend. 6.

[9] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.7 Affirmative Duties in Protection of Right
110k641.7(1) k. In General; Advice, Preliminary Inquiry and Appointment by Court. Most Cited Cases

When circumstances are egregious enough to constitute forfeiture of a defendant's right to counsel, a court need not determine whether a defendant understands the risks of self-representation or warn him that he will lose his right to counsel. U.S.C.A. Const.Amend. 6.

[10] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.4 Waiver of Right to Counsel
110k641.4(1) k. In General; Right to Appear Pro Se. Most Cited Cases

Because of its drastic nature, a defendant must engage in extreme conduct before forfeiture of a

defendant's right to counsel may be imposed. U.S.C.A. Const.Amend. 6.

[11] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.4 Waiver of Right to Counsel
110k641.4(2) k. Capacity and Requisites in General. Most Cited Cases

Before a court will find an implied waiver of the right to counsel based on a defendant's conduct, two requirements must be satisfied: first, the implied waiver must be voluntary, and second, the waiver must have been made knowingly and intelligently. U.S.C.A. Const.Amend. 6.

[12] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.7 Affirmative Duties in Protection of Right
110k641.7(1) k. In General; Advice, Preliminary Inquiry and Appointment by Court. Most Cited Cases

For an implied waiver of right to counsel based on a defendant's conduct to be voluntary, trial court must warn defendant of specific conduct that will give rise to the waiver of his right to counsel; in other words, when a trial court believes that a defendant's conduct is unacceptable and will result in a waiver of his right to counsel, court must warn defendant that continuation of the unacceptable conduct will be treated as an implied request to proceed pro se and therefore a waiver of the right to counsel, and such warning must be explicit so that a defendant clearly understands both nature of the unacceptable conduct and the implications of any such future conduct. U.S.C.A. Const.Amend. 6.

[13] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.7 Affirmative Duties in Protection of Right
110k641.7(1) k. In General; Advice, Preliminary Inquiry and Appointment by Court. Most Cited Cases

For an implied waiver of right to counsel based on a defendant's conduct to be knowing and intelligent, the trial court must ensure that defendant is cognizant of dangers and disadvantages of self-representation by explaining the consequences of a decision to proceed pro se and, at a minimum, must ascertain that defendant possesses intelligence and capacity to understand and appreciate the consequences of decision to represent himself, including expectation that defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story, and that defendant comprehends the nature of charges and proceedings, range of permissible punishments, and any additional facts essential to a broad understanding of the case. U.S.C.A. Const.Amend. 6.

[14] KeyCite Notes 

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases

110 Criminal Law KeyCite Notes 
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.10 k. Conduct of Trial in General. Most Cited Cases

In the absence of a colloquy on the record between the court and the defendant determining the validity of a waiver of counsel, reviewing court should review the record de novo to determine validity of the waiver regardless of whether extraordinary circumstances exist, and any doubt must be resolved in favor of the defendant; abrogating *State v. Heaton*, 958 P.2d 911. U.S.C.A. Const.Amend. 6.

[15] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.4 Waiver of Right to Counsel
110k641.4(4) k. Validity and Sufficiency, Particular Cases. Most Cited Cases

Record did not establish that defendant voluntarily waived his right to counsel through his own conduct; record showed that while the trial judge repeatedly chastised defendant for his past unwillingness to follow his counsel's advice, judge's statements with respect to defendant's right to appointed counsel were inconsistent and confusing, as judge stated he would appoint public defender's office and then stated that the role of public defender was limited to standby counsel, and after agreeing to appoint counsel, the trial judge never warned defendant of the conduct that would give rise to an implied waiver of his right to appointed counsel but nevertheless imposed such a waiver during time when defendant did not appear to have engaged in any objectionable conduct. U.S.C.A. Const.Amend. 6.

[16] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.4 Waiver of Right to Counsel
110k641.4(4) k. Validity and Sufficiency, Particular Cases. Most Cited Cases

Even if defendant had voluntarily waived his right to counsel through his own conduct, record did not establish that such waiver was knowing and intelligent; nothing in record indicated that, at the time of the alleged waiver, defendant appreciated the consequences of the decision to represent himself,

including the expectation that he would need to comply with technical rules and the recognition that presenting a defense was not just a matter of telling one's story. U.S.C.A. Const.Amend. 6.

***718** Mark L. Shurtleff, Att'y Gen., Kris C. Leonard, Asst. Att'y Gen., Salt Lake City, for plaintiff.
Sharon L. Preston, Salt Lake City, for defendant.

On Certiorari to the Utah Court of Appeals

PARRISH, Justice:
¶ 1 Defendant Robert Brian Pedockie was charged with aggravated kidnapping, a first degree felony. During pretrial proceedings, Pedockie was represented by a string of various public defenders and private attorneys, all of whom either withdrew or were fired. Despite Pedockie's invocation of his Sixth Amendment right to counsel, the trial court allowed the trial to proceed with Pedockie representing himself. Pedockie was convicted and appealed.
¶ 2 The court of appeals held that Pedockie voluntarily waived his right to counsel through his dilatory conduct. It nevertheless reversed his conviction, holding that the waiver was not knowing and intelligent. We affirm the reversal of Pedockie's conviction, but on different grounds. Like the court of appeals, we recognize that an accused may voluntarily waive his right to counsel through his conduct. But we find no such voluntary waiver in this case.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 We recite the facts in a manner consistent with the jury's verdict. On January 3, 2001, **Pedockie** and his cousin kidnapped Nicole Sather, **Pedockie's** ex-girlfriend. When Sather attempted to escape from **Pedockie's** truck, **Pedockie's** cousin shot at her, and **Pedockie** restrained her. The next day, **Pedockie** threatened to kill Sather and himself. When **Pedockie** stopped for gas, Sather escaped with the help of a gas station employee. **Pedockie** was later arrested and charged with aggravated kidnapping, a first degree felony, in violation of Utah Code section 76-5-302. [FN1]

FN1. Utah Code Ann. § 76-5-302 (1999).

¶ 4 At **Pedockie's** initial appearance on February 20, 2001, the trial judge found **Pedockie** indigent and appointed the Weber County Public Defenders' Association ("PDA") to defend him. The judge also gave **Pedockie** a copy of the Information that had been filed and advised him of the charges against him and the potential penalties associated therewith. **Pedockie** requested disposition of his case according to the Speedy Trial Statute, which entitles a defendant who is imprisoned to be tried within 120 days of the request. [FN2] At a later hearing, the judge set **Pedockie's** jury trial for August 13, 2001.

FN2. *Id.*

¶ 5 On August 1, 2001, at the request of **Pedockie's** PDA attorney, who needed additional time to prepare, the trial judge continued the trial to December 10, 2001. The trial was subsequently continued to February 4, 2002, to accommodate a conflict in the prosecutor's schedule.
¶ 6 Scheduling conflicts, however, were not the only difficulties arising during pretrial proceedings. Difficulties between **Pedockie** and his attorneys were a recurring theme. **Pedockie's** first two PDA attorneys withdrew, through no fault of **Pedockie**, because one had a conflict of interest and the other lost his contract with the PDA. And less than a month before trial, **Pedockie's** third PDA attorney, James Retallick, also moved to withdraw.
¶ 7 Retallick informed the trial judge that **Pedockie** was insisting that he file four motions that Retallick believed were "absolutely frivolous." Although Retallick had explained to **Pedockie** why he could not in good faith file the motions, **Pedockie** nevertheless believed that Retallick was not representing his best interests and requested the appointment of a PDA attorney who would file them. The trial judge explained that **Pedockie** did not have a right to "pick and choose" an attorney from the PDA, **stating**, "I can appoint an ***719** attorney to work with you but if you don't want to accept

his advice, you've either got to represent yourself or get your own attorney." **Pedockie stated** that he did not wish to proceed pro se and agreed to have Retallick continue the representation. The next day, however, **Pedockie** fired him.

¶ 8 A couple of weeks later, **Pedockie** requested that the judge release the PDA office because he had hired private attorney Ed Brass to represent him. **Stating** that **Pedockie** was entitled to legal representation, the trial judge granted his request and continued the trial to April 15, 2002, to give Brass time to prepare.

¶ 9 Three days before trial, Brass moved to withdraw as counsel, **stating** that he had an ethical conflict with **Pedockie** that made representation impossible. Brass was unwilling to stay on the case as standby counsel because he did not believe that **Pedockie** was "sophisticated enough to handle a first degree felony trial" without full-time counsel. The trial judge reluctantly granted Brass's motion to withdraw, **stating**, "I want Mr. **Pedockie** to understand, I'm not gonna continue this case again···· [Y]ou either get an attorney who will represent you on the matter or you're just gonna represent yourself next time it's scheduled."

¶ 10 On May 1, **Pedockie** appeared in court without an attorney and reported that he was still attempting to hire one. The judge continued the case until May 29 and again admonished **Pedockie** to get an attorney. But on May 29, **Pedockie** again appeared without counsel, explaining that he had been unable to find an attorney to file his motion for prosecutorial misconduct because "[e]verybody thinks it's unethical to bring."

¶ 11 The trial judge warned **Pedockie** that he was going to set the case for trial and that **Pedockie** would have to get an attorney or proceed without one. **Pedockie** emphasized the seriousness of his case, explaining that "you're talking about my life at stake." The prosecutor asked the judge to make a record that **Pedockie's** "election to represent himself at the time of trial is voluntary and knowing." The judge responded that "the problem is he doesn't want to represent himself···· But on the other side, every time we give him an attorney or have him hire an attorney, the attorney withdraws." When Pedockie reiterated that he wanted another attorney appointed who would file his motions, the judge stated, "See, that's the problem. You need to start following the advice of the attorney that's representing you instead of you trying to tell him what to do."

¶ 12 After scheduling trial for September 30, 2002, the trial judge informed Pedockie that he could hire a private attorney, but warned him that the trial would not be continued again. The trial judge also appointed standby counsel, but clarified that Pedockie was still responsible for filing and arguing his own motions.

¶ 13 At a July 31 hearing, Pedockie announced that he had hired Paul Grant as his attorney but that Grant had indicated he was going to withdraw. Pedockie asked the judge to appoint primary counsel who could assist him in arguing his motions, and the judge chastised him for his unwillingness to follow the advice of his prior attorneys. But when Pedockie persisted, the trial judge relented:

The Court: I can appoint the public defenders' office. I cannot pick and choose which attorney represents you. There are at least three people in that office that you've had, and now they no longer can represent you. So do you want the public defenders' office or not?

Mr. Pedockie: As of right now, I'd like to-I need a attorney-

The Court: Okay.

Mr. Pedockie:-Unless you're gonna-

The Court: I'll appoint the public defenders' office for the third time then. Okay.

A hearing on Pedockie's motions was then set for August 12. Thereafter, the trial judge indicated that Pedockie needed to give a copy of his motions to the PDA attorney prior to the hearing, and the clerk suggested that they coordinate with the PDA to make sure August 12 was an acceptable date. All of this was consistent with the fact that the PDA had been appointed to act as Pedockie's primary, rather than standby, counsel.

***720** ¶ 14 Prison officials failed to transport Pedockie to the August 12 hearing. In Pedockie's absence, the trial judge informed Martin Gravis, the PDA attorney who had been assigned to represent Pedockie following the July 31 hearing, that he "was not inclined to appoint a public defender" for Pedockie and that Gravis was there only in the capacity as standby counsel. The motion hearing was then rescheduled for the following day.

¶ 15 The next day, Pedockie expressed surprise and confusion when he learned that Gravis was acting only as standby counsel and would not argue the motions. Pedockie again requested that the court appoint an attorney to argue his motions, emphasizing their importance to his case and his desire to see them argued properly. The trial judge declined, indicating that he would not appoint an attorney because of **Pedockie's** insistence that his attorneys pursue unethical courses of action. The

judge reiterated that, if **Pedockie** wanted an attorney, he would have to hire one himself.
¶ 16 During a hearing on August 21, the trial judge again scolded **Pedockie**, refused to appoint an attorney, and informed **Pedockie** that he must hire a private attorney or proceed pro se. He told **Pedockie** that his attorneys have "always asked to be recused because you want them to do something that's illegal that's a violation of the Canons of Ethics." **Pedockie** insisted that he could not afford a private attorney and that he was invoking his Sixth Amendment right to counsel.
¶ 17 At a September 18 pretrial conference, **Pedockie** failed to submit the jury instructions that his standby counsel had prepared and again requested that an attorney be appointed to represent him. The trial judge refused, **stating** that he had waived his right to counsel.
¶ 18 **Pedockie's** jury trial began on September 30, 2002. **Pedockie** again requested counsel, complaining that he was neither "educated nor familiar with the rules and proceedings" of the court and did not know how many juror challenges he had. The trial judge denied **Pedockie's** request, finding that **Pedockie** had knowingly and intelligently waived his right to an attorney. **Pedockie** then asked that standby counsel be excused from the case because the whole case was a "scam and a mockracy" and standby counsel was "just taking up the taxpayers' dollars." After explaining the benefits of having standby counsel who was trained in the law, the judge granted **Pedockie's** request, and **Pedockie** proceeded to represent himself.
¶ 19 The jury found **Pedockie** guilty of aggravated kidnapping, and he was sentenced. **Pedockie** appealed, arguing that he was deprived of his constitutional right to assistance of counsel.[FN3] The court of appeals reversed **Pedockie's** conviction and remanded the case for a new trial.

FN3. ***State** v. **Pedockie**,* 2004 UT App 224, ¶ 1, 95 P.3d 1182.

¶ 20 The court of appeals first considered whether **Pedockie's** conduct evidenced a voluntary waiver of his right to counsel. Recognizing that a defendant's decision to waive counsel may be subject to constitutionally permissible constraints, the court of appeals reasoned that the trial judge reasonably required **Pedockie** to either accept representation by the PDA, hire private counsel, or proceed pro se. It therefore held that **Pedockie** had voluntarily waived his right to counsel through his conduct.
¶ 21 The court of appeals then considered whether **Pedockie's** waiver was knowing and intelligent. Because the trial judge had failed to conduct an on-the-record colloquy with **Pedockie** to inform him of the dangers and disadvantages of self-representation, the court of appeals was confronted with the question of whether the case involved "extraordinary circumstances" that would require a de novo review of the record. It concluded it need not decide that question because there was "nothing in the record to persuade [it] that [Pedockie's] waiver was knowing and intelligent." [FN4] It therefore reversed Pedockie's conviction and remanded the case for a new trial.

FN4. *Id.* ¶ 35.

¶ 22 The State petitioned for certiorari, which we granted. We have jurisdiction pursuant**721* to Utah Code section 78-2-2(3)(a).[FN5]

FN5. Utah Code Ann. § 78-2-2(3)(a) (2002).

STANDARD OF REVIEW

[1] [2] [3] ¶ 23 "On certiorari, we review the decision of the court of appeals, not the decision of the trial court." [FN6] Whether Pedockie voluntarily, knowingly, and intelligently waived his right to counsel is a mixed question of law and fact.[FN7] While we review questions of law for correctness, a trial court's factual findings may be reversed on appeal only if they are clearly erroneous.[FN8]

FN6. *Bear River Mut. Ins. Co. v. Wall,* 1999 UT 33, ¶ 4, 978 P.2d 460.

FN7. *State v. Heaton,* 958 P.2d 911, 914 (Utah 1998).

FN8. *State v. Harmon,* 910 P.2d 1196, 1199 (Utah 1995).

ANALYSIS

¶ 24 The State urges us to find that Pedockie waived his right to counsel through his dilatory conduct and that he did so knowingly and intelligently. Whether a defendant may waive his right to counsel through his conduct is an issue of first impression in this court. We therefore begin by addressing the substantive requirements for waiver of a defendant's right to counsel under the Sixth Amendment and the procedure to be followed by appellate courts when reviewing cases of alleged waiver.[FN9] With these substantive and procedural requirements in mind, we turn to the court of appeals' conclusion that Pedockie waived his right to counsel through his dilatory conduct but that the waiver was invalid because it was not knowing and intelligent.

FN9. *State v. Pedockie,* 2004 UT App 224, ¶ 30 n. 5, 95 P.3d 1182 (noting that Pedockie did not preserve a state constitutional claim).

I. THE RIGHT TO ASSISTANCE OF COUNSEL

¶ 25 The Sixth Amendment to the United States Constitution guarantees defendants the right to counsel in felony proceedings.[FN10] As the United States Supreme Court articulated in *Powell v. Alabama,* "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." [FN11]

FN10. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ··· to have the Assistance of Counsel for his defence.").

FN11. 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

[4] [5] ¶ 26 Defendants also have the right to waive their right to counsel. The United States Supreme Court in *Faretta v. California* [FN12] held that the Sixth Amendment implicitly guarantees criminal defendants the ability to waive their right to the assistance of counsel and proceed pro se. Before permitting a defendant to do so, however, a trial court should ensure that the waiver is voluntary, knowing, and intelligent. [FN13] A defendant should "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing." [FN14]

FN12. 422 U.S. 806, 818-32, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

FN13. *See id.* at 835, 95 S.Ct. 2525.

FN14. *Id.* (internal quotation marks omitted).

¶ 27 Courts have recognized three methods pursuant to which a defendant may give up his constitutional right to the assistance of counsel: waiver, forfeiture, and waiver by conduct.[FN15] We outline the elements of each.

FN15. *See United States v. Goldberg,* 67 F.3d 1092, 1099 (3d Cir.1995).

A. True Waiver

¶ 28 True waiver is the most common method by which defendants forsake their right to counsel. True waiver typically occurs when a defendant affirmatively requests permission to proceed pro se.[FN16] In *State v. Bakalov,* we required that defendants "clearly and unequivocally" request self-representation in order to waive their right to counsel.***722** [FN17]

FN16. *Id.*

FN17. 1999 UT 45, ¶ 16, 979 P.2d 799.

[6] ¶ 29 When a defendant requests to proceed pro se, his waiver will be valid only if he acts knowingly and intelligently, being aware of the dangers inherent in self-representation.[FN18] The most reliable way for a trial court to determine whether a defendant is aware of the dangers and disadvantages of self-representation is to engage in a colloquy on the record. At times, however, we have found a waiver of the right to counsel absent a colloquy. For example, in *State v. Frampton,* we found that a defendant knowingly and intelligently waived his right to counsel when he affirmatively requested to proceed pro se despite the fact that the trial court had not engaged in a colloquy.[FN19] We reasoned that the defendant should have realized the "value of counsel" because he was represented by counsel in a prior trial.[FN20] Additionally, we concluded that he must have realized the seriousness of the charges filed against him because the judge had appointed standby counsel over his objection [FN21] and the judge had explained the charges, including the maximum penalty associated therewith, in two prior trials involving the same charges.[FN22]

FN18. *Faretta,* 422 U.S. at 835, 95 S.Ct. 2525.

FN19. 737 P.2d 183, 187-89 (Utah 1987).

FN20. *Id.* at 189.

FN21. *Id.* at 189 n. 19.

FN22. *Id.* at 189.

¶ 30 True waiver does not apply in this case because Pedockie never expressed a desire to represent himself. To the contrary, the record is replete with instances of Pedockie insisting that he "want[ed] adequate counsel" and that he was "not going to represent [himself]."

B. Forfeiture

[7] [8] ¶ 31 While waiver is an intentional relinquishment of a known right, forfeiture occupies the opposite end of the spectrum. Unlike waiver, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." [FN23]

FN23. *United States v. Goldberg,* 67 F.3d 1092, 1100 (3d Cir.1995).

[9] [10] ¶ 32 In *United States v. Goldberg,* the United States Court of Appeals for the Third Circuit observed that a defendant may be deemed to have forfeited his right to counsel when he engages in "extremely dilatory conduct" or abusive behavior, such as physically assaulting counsel.[FN24] When circumstances are egregious enough to constitute forfeiture, a court need not determine whether a defendant understands the risks of self-representation or warn him that he will lose his right to counsel. But because of its drastic nature, a defendant must engage in extreme conduct before forfeiture may be imposed.[FN25] We find no basis for imposing forfeiture under the facts presented here.

FN24. *Id.* at 1101.

FN25. *Id.*

C. Waiver by Conduct

¶ 33 Waiver by conduct, often referred to as implied waiver, combines elements of both true waiver and forfeiture.[FN26] "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and thus, as a waiver of the right to counsel." [FN27] The conduct required to give rise to an implied waiver does not have to be as extreme as that required for forfeiture. And unlike the situation in cases of true waiver, a defendant need not intend to relinquish the right to counsel. [FN28] But the defendant must have been warned that continuation of the unacceptable conduct will result in a waiver of the right to counsel. As is the case in a true waiver situation, the waiver also must be knowing and intelligent. In other words, the ***723** defendant must have also possessed an awareness of the dangers and disadvantages of self-representation at the time of the implied waiver.[FN29]

FN26. *Id.* at 1100-01.

FN27. *Id.* at 1100.

FN28. *Id.* at 1101.

FN29. *Id.* at 1102.

¶ 34 While the United States Supreme Court has never specifically addressed whether a defendant may waive the right to counsel through inappropriate conduct,[FN30] it has recognized that a defendant may lose the constitutional right to be present at trial because of such conduct.[FN31] In *Illinois v. Allen,* the trial court had warned the defendant that he would lose his right to be present at his trial because of his disruptive behavior, yet he continued "in a manner so disorderly, disruptive, and disrespectful of the court that his trial [could not] be carried on with him in the courtroom." [FN32] Consequently, he lost the constitutional right to be present, even though he did not affirmatively relinquish it.[FN33] Thus, *Allen* suggests that a defendant can lose constitutional rights because of his conduct so long as he is " *aware* of the consequences of his actions." [FN34]

FN30. *Id.*

FN31. *Illinois v. Allen,* 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

FN32. *Id.*

FN33. *Id.*

FN34. *Goldberg,* 67 F.3d at 1101 (emphasis added).

¶ 35 In *United States v. Weninger,*[FN35] the United States Court of Appeals for the Tenth Circuit applied analogous analysis in holding that the defendant had waived his right to counsel by failing to secure an attorney for trial. The defendant was given ample time and was warned to obtain an attorney, but he strategically and stubbornly failed to do so.[FN36] The Tenth Circuit held that this dilatory conduct should be treated as a request to proceed pro se.[FN37]

FN35. 624 F.2d 163, 166-67 (10th Cir.1980).

FN36. *Id.; see also United States v. Bauer,* 956 F.2d 693, 694 (7th Cir.1992) (finding that the combination of the defendant's "ability to pay for counsel plus refusal to do so ··· waive[d] the right to counsel at trial").

FN37. *Weninger,* 624 F.2d at 166-67; *see also Goldberg,* 67 F.3d at 1102-03 (refusing to find waiver by conduct because the court had not made the defendant aware of the risks of self-representation).

[11] ¶ 36 In summary, before we will find an implied waiver of the right to counsel based on a defendant's conduct, two requirements must be satisfied. First, the implied waiver must be voluntary. Second, the waiver must have been made knowingly and intelligently.

[12] ¶ 37 For an implied waiver to be voluntary, the trial court must warn the defendant of the specific conduct that will give rise to the waiver of his right to counsel. In other words, when a trial court believes that a defendant's conduct is unacceptable and will result in a waiver of his right to counsel, the court must warn the defendant that continuation of the unacceptable conduct will be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel.[FN38] This warning must be explicit so that a defendant clearly understands both the nature of the unacceptable conduct and the implications of any such future conduct.

FN38. *Goldberg,* 67 F.3d at 1100-03.

[13] ¶ 38 For an implied waiver to be knowing and intelligent, the trial court must ensure that the defendant is cognizant of the dangers and disadvantages of self-representation. The court should explain the consequences of a decision to proceed pro se and, at a minimum, must ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story; and ··· ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.[FN39]

FN39. *State v. Heaton,* 958 P.2d 911, 918 (Utah 1998).

***724** ¶ 39 Trial courts generally evaluate a defendant's understanding and intelligence by conducting a colloquy on the record. In those cases where a defendant continues to insist on his right to counsel, it may seem awkward for a trial court to engage in a typical colloquy regarding the inherent dangers of self-representation. But we still strongly encourage trial courts to do so as a means to ensure that a defendant is aware of the disadvantages and dangers of self-representation.[FN40]

FN40. *See* *Trujillo v. State,* 2 P.3d 567, 575 (Wyo.2000) (explaining that a warning in a waiver by conduct situation "should be comparable in content to the warning given to a defendant who affirmatively asserts his right to self-representation").

II. DETERMINING THE VALIDITY OF A WAIVER

¶ 40 While we have urged that trial courts engage in an on-the-record colloquy with defendants to ensure that they are aware of the dangers and disadvantages of self-representation, we have not imposed an absolute requirement that they do so. Rather, we have recognized that the validity of a defendant's waiver turns upon the particular facts and circumstances surrounding each case.
¶ 41 Relying on admittedly confusing language from some of our prior cases, the court of appeals stated that, in the absence of a colloquy, appellate courts are required to conduct a de novo review of the record to determine the validity of a defendant's waiver of the right to counsel only in "extraordinary circumstances." It then concluded that it need not evaluate Pedockie's case for such extraordinary circumstances because "there is simply nothing in the record to persuade us that [Pedockie's] waiver was knowing and intelligent." FN41

FN41. *State v. Pedockie,* 2004 UT App 224, ¶ 35, 95 P.3d 1182.

¶ 42 We take this opportunity to clarify our prior case law regarding appellate review in cases involving waiver of the right to counsel. As previously stated, before we will accept a defendant's waiver of his right to counsel, we have required that he be "aware of the dangers and disadvantages [ ] of self-representation," FN42 and we continue to strongly recommend a colloquy on the record as the preferred method of determining whether a defendant is aware of these risks. Indeed, a trial court generally cannot determine a defendant's understanding without engaging in the "penetrating questioning" found in a colloquy.FN43 The sixteen-point colloquy found in *State v. Frampton*FN44 establishes a sound framework for efficient and complete questioning. Moreover, on appeal, such a colloquy provides the reviewing court with " 'an objective basis for review' upon the almost inevitable challenge to the waiver by the defendant who proceeds pro se and is subsequently convicted." FN45

FN42. *State v. Frampton,* 737 P.2d 183, 187 (Utah 1987) (internal quotation marks and citation omitted).

FN43. *Id.*

FN44. *Id.* at 187 n. 12.

FN45. Wayne R. LaFave et al., 3 *Criminal Procedure* § 11.5(c) (2d ed.1999) (quoting *People v. Sawyer,* 57 N.Y.2d 12, 453 N.Y.S.2d 418, 438 N.E.2d 1133, 1138 (1982)); *see also* *State v. Heaton,* 958 P.2d 911, 918 (Utah 1998).

¶ 43 In declining to review the record de novo, the court of appeals relied on *State v. Heaton,* where we held that a reviewing court could engage in de novo review only in "extraordinary circumstances." FN46 But in two cases following *Heaton,* we found that de novo review was appropriate in the absence of a colloquy and never indicated that such a review was dependent on the existence of extraordinary circumstances.FN47 We now clarify that it is not.

FN46. 958 P.2d at 918.

FN47. *See* *State v. Hassan,* 2004 UT 99, ¶ 22, 108 P.3d 695; *State v. Arguelles,* 2003 UT 1, ¶ 70, 63 P.3d 731.

¶ 44 When this court stated in *Heaton* that a de novo review was appropriate only in extraordinary

circumstances, we cited the Ninth Circuit case of *Harding v. Lewis.*[FN48] But the *Harding* court actually allowed for de novo review absent a colloquy; it only ***725** explained that a valid waiver absent a colloquy should "rarely" be found.[FN49] Our mistaken interpretation of *Harding,* combined with the fact that *Heaton* is inconsistent with this court's more recent decisions, suggests the need for us to rearticulate the procedure to be followed by reviewing courts when evaluating the validity of a defendant's waiver of the right to counsel in the absence of a colloquy. [FN50]

FN48. 834 F.2d 853, 857 (9th Cir.1987).

FN49. *Id.*

FN50. *See Hassan,* 2004 UT 99, ¶ 22, 108 P.3d 695; *Arguelles,* 2003 UT 1, ¶ 70, 63 P.3d 731; *State v. Frampton,* 737 P.2d 183, 188 (Utah 1987).

[14] ¶ 45 Absent a colloquy on the record, a reviewing court should review the record de novo to determine whether the defendant knowingly and intelligently waived his right to counsel. De novo review is appropriate because the validity of a waiver does not turn upon "whether the trial judge actually conducted the colloquy," [FN51] but upon whether the defendant understood the consequences of waiver.[FN52] A de novo review allows a reviewing court to analyze the "particular facts and circumstances surrounding each case" to make that determination.[FN53] But we pause to note that, considering the strong presumption against waiver and the fundamental nature of the right to counsel, any doubts must be resolved in favor of the defendant. We therefore anticipate that reviewing courts will rarely find a valid waiver of the right to counsel absent a colloquy.

FN51. *Hassan,* 2004 UT 99, ¶ 22, 108 P.3d 695.

FN52. *Frampton,* 737 P.2d at 188.

FN53. *Id.*

III. PEDOCKIE'S CASE

[15] ¶ 46 We now turn to the particular facts of this case. This case is a prime example of the confusion and inconsistency that can permeate proceedings in the absence of an explicit warning and colloquy regarding the right to counsel. In the face of such confusion, we cannot find a voluntary, knowing, or intelligent waiver of **Pedockie's** right to counsel.

¶ 47 First, we conclude that **Pedockie** did not voluntarily waive his right to counsel through his conduct. While the trial judge repeatedly chastised **Pedockie** for his past unwillingness to follow counsel's advice, his statements with respect to **Pedockie's** right to appointed counsel were inconsistent and confusing.

¶ 48 For example, when Retallick moved to withdraw, the trial judge warned **Pedockie** that he would need to either accept Retallick's advice, represent himself, or get his own attorney. But after **Pedockie** fired Retallick, the trial judge ordered a continuance, **stating** that "you're entitled to have an attorney represent you, and, obviously, Mr. Brass ··· hasn't had enough time to get ready."

¶ 49 When Brass withdrew, the trial judge continued to scold **Pedockie** for prior delays and maintain that **Pedockie** would need to hire a private attorney or proceed pro se. Nevertheless, at the July 31 hearing, the trial judge agreed to "appoint the public defender's office for the third time" and gave every indication that the PDA attorney would act as primary, rather than standby, counsel. Pedockie relied on this statement when he failed to retain private counsel and appeared at the August 13 hearing expecting representation by the PDA. He was thus understandably confused when the judge insisted that the PDA attorney's role was limited to that of standby counsel. It is particularly troubling

that, after agreeing to appoint counsel on July 31, the trial judge never warned Pedockie of the conduct that would give rise to an implied waiver of his right to appointed counsel but nevertheless imposed such a waiver sometime between the July 31 and August 13 hearings when Pedockie does not appear to have engaged in any objectionable conduct. Because any uncertainty over an alleged waiver of the right to counsel must be resolved in favor of an accused, we are unable to find a voluntary waiver under these circumstances.

[16] ¶ 50 Finally, even if Pedockie had voluntarily waived his right to counsel, our de novo review of the record fails to establish that any implied waiver was knowing and intelligent. There is nothing in the record to ***726** indicate that, at the time of the alleged waiver, Pedockie appreciated "the consequences of the decision to represent himself, including the expectation that [he would need to] comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story." FN54

FN54. *State v. Heaton,* 958 P.2d 911, 918 (Utah 1998).

¶ 51 Although the record does contain evidence that Pedockie wanted his case to be tried by an attorney because he knew "nothing about the law" and was not familiar with the rules of the court, such general knowledge does not necessarily evidence an understanding of the technical requirements inherent in presenting one's case. While Pedockie arguably obtained some understanding of these technical requirements during the course of the proceedings, the record is devoid of evidence that Pedockie understood these requirements prior to the time of the alleged waiver. For instance, Pedockie was informed of the technical rules of the court when the judge appointed standby counsel and explained that standby counsel could help prepare jury instructions and cross-examine and subpoena witnesses for trial but would not argue Pedockie's motions. By this point, however, the trial judge had already ruled that Pedockie was not entitled to appointment of primary counsel. Therefore, any knowledge that Pedockie may have had regarding the dangers and disadvantages of self-representation was too little, too late.

CONCLUSION

¶ 52 We agree with the court of appeals that Pedockie is entitled to a new trial. We have reviewed the record and conclude that Pedockie did not voluntarily, knowingly, or intelligently waive his right to the assistance of counsel.

¶ 53 Chief Justice DURHAM, Associate Chief Justice WILKINS, Justice DURRANT, and Justice NEHRING concur in Justice PARRISH's opinion.

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